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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1988

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The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

*Petitioners,*

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

*Respondents,*

United States of America,

*Respondent,*

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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104 pp

## Questions Presented

The Equal Access Act, 20 U.S.C. §4071 et. seq. (1988) prohibits federally funded secondary schools sanctioning "noncurriculum related" student initiated "meetings" from discriminating on the basis of the content of speech against other student initiated "meetings." The questions presented are:

1. Whether, by requiring schools which officially sponsor co-curricular student clubs to officially sponsor student religious meetings, the Act unconstitutionally establishes religion, particularly when enforced against a school which permits informal religious meetings, but refuses to grant them official sanction.

2. Whether, for purposes of the Act or the Free Speech Clause, certain types of student "meetings" are necessarily "noncurriculum related," and thus create a limited open forum, notwithstanding a determination by school officials that those "meetings" are curriculum related, and that only curriculum related activities will be permitted.

## PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

Questions Presented . . . . . i

Parties to the Proceedings . . . ii

Table of Contents . . . . . iii

Table of Authorities . . . . . v

Jurisdiction . . . . . 2

Opinions Below . . . . . 3

Constitutional and Statutory Provisions. . . . . 3

Statement of the Case . . . . . 3

WHS Co-Curricular Program. . . . 3

The Christian Bible Club's Application . . . . . 5

This Law Suit. . . . . 7

The District Court's Opinion . . 13

The Court of Appeals' Opinion . . 15

Reasons for Granting the Writ . . 17

I. The Court Should Resolve the Constitutionality of the Equal Access Act . . . . . 17

II. The Court Should Decide What Constitutes A Noncurriculum Releated Meeting for Purposes of Act . . . . . 24

Conclusion . . . . . 32

Appendices:

Decision and Judgment of the United States Court of Appeals for the Eighth Circuit, No. 88-1227, (February 8, 1989) . . . . . A-1

Decision of the United States District Court for the District of Nebraska, CV-85-0-426 (February 2, 1988)) . . . . . B-1

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071 et. seq. . . . . C-1

## Table of Authorities

### Cases

Amidei v. Spring Branch Ind. School Dist., C/A H-84-4673, (S.D. Tex. 1985). . . . . 21

Bell v. Little Axe Independent School District, 766 F.2d 1391, (10th Cir. 1985). . . . . 18, 23

Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Pa. 1983), rev'd, 741 F.2d 538, (3d. Cir. 1984), rev'd on other grounds, 475 U.S. 534 (1986). . . . 8, 17, 18, 19, 23

Brandon v. Board of Education, 635 F.2d 971 (2d. Cir. 1980), cert. denied, 454 U.S. 1123, (1981) . . . . . 18, 20, 23

Buffalo Board of Educ. v. Barr, C/A 88-1306A (W.D.N.Y. 1988), petition for writ of mandamus pending, (2d Cir. 1989) . . 21

Clark v. Dallas Independent School District, 671 F.Supp. 119, (N.D. Tex. 1987), on reconsideration, 701 F. Supp. 594, (N.D. Texas 1988), app. pending, 88-1681 (5th Cir. 1989) . . 18, 20

Clergy and Laity Concerned v. Chicago Board of Education, 586 F.Supp. 1408, (N.D. Ill. 1984). . . . . 18

Edwards v. Aguillard, 107 S.Ct. 2573 (1987) . . . 19

Garnett v. Renton Area School District, 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending . . . . . 21, 30

Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988) . . . 14, 22

Hunt v. Board of Educ., 321 F.Supp. 1263, (S.D.Wa.Va. 1971) . . . . 18

Johnson v. Huntington Beach
Union H.S. Dist.,
68 Cal. App. 3d 1,
137 Cal. Rptr. 43 (  ),
cert. denied,
434 U.S. 877 (1977) . . . 18

Lubbock Civil Liberties,
Union v. Lubbock Independent,
School District,
669 F.2d 1038,
(5th Cir. 1982),
cert. denied,
459 U.S. 1159 (1983) . . . 18, 23

McCollum v.
Board of Education,
331 U.S. 1 (1948) . . . . 19

Mesa v. California,
57 U.S.L.W. 4199 (1989) . . 30

Mississippi College for
Women v. Hogan,
458 U.S. 718 (1982) . . . 20

Nartowicz v. Clayton County
School District,
736 F.2d 646,
(11th Cir. 1984) . . . . 18

Perry Educational Association
v. Perry Local Educators
Association,
460 U.S. 37 (1983) . . . . 13

Perumal v. Saddleback Valley School District, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 ( ), cert. denied, 109 S.Ct. 327 (1988) . . . 21

Trietly v. Board of Education, 65 A.D. 2d 1, 409 NYS 2d 912, (4th Dept. 1978) . . . . . 18

Widmar v. Vincent, 454 U.S. 263 (1981) . . . 13, 16, 17, 18

CONSTITUTIONS AND STATUTES

U.S. Const., Amend. I . . . passim

Equal Access Act, 20 U.S.C. §4071 et. seq. (1988) . . . . . passim

28 U.S.C. §1254(1). . . . . 2

28 U.S.C. §1331 . . . . . 2

28 U.S.C. §1343 . . . . . 2

28 U.S.C. §1344 . . . . . 2

28 U.S.C. §2403(a). . . . . 7

OTHER AUTHORITIES

69 Md. Opinion Attorney General _ (1984) . . . . 22

Letter, J. Sietsema, CCD Coordinator of National, Center for Education Statistics, (March 2, 1989) . . . . . 29

Memorandum of December 12, 1989 from Robert Stone, Deputy Commissioner of New York State Education Department . . . 20

Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee of Education and Labor, 98th Cong. 1st Sess. 46, 124 (1984) . . . . . 22

130 Cong. Rec. S. 8341 (daily ed. June 27, 1984), (remarks of Senator Leahy) . 25

130 Cong. Rec. S. 8342, (daily ed. June 27, 1984), (remarks of Senators Hatfield and Gorton) . . . . . 25, 27

130 Cong. Rec. S. 8357,
(daily ed. June 27, 1984),
(remarks of Senator
Durenberger) . . . . . 26

130 Cong. Rec. S. 8358,
(daily ed. June 27, 1984),
(remarks of Senator Biden) . 27

130 Cong. Rec. H. 7732
(daily ed. July 25, 1984),
(remarks of Representative
Goodling) . . . . . 26, 28

No. 88-___

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

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and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents.

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Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioners, Board of Education of the Westside Community Schools and several of its officials, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 8, 1989.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343 and 1344.

## Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit is reported at 867 F.2d 1076, and is reprinted as Appendix A. The memorandum decision of the United States District of Nebraska is not reported, but is reprinted as Appendix B.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### First Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071-4074 is reprinted as Appendix C.

## STATEMENT OF THE CASE

### WHS Co-Curricular Program

Westside High School ("WHS") had an extensive and long-standing program of officially sanctioned after-school

student activities or clubs. Each of these activities was intended to, and, in the opinion of school officials, did, directly further the educational mission of the school. Each student activity or club was directed, controlled or supervised by a member of the school faculty or administration. These faculty members received extra compensation from the school district.

Official approval carried with it access to school facilities, including the bulletin board, public address system, and school year book. Recognized clubs aggressively recruited new members at an annual school-sponsored Club Fair, which took place during the regular school day.

Administrative approval of a proposed club depended on student interest, availability of financing and facilities, and compatibility with WHS'

educational mission. Only a few requests for sanction (which might originate with students, faculty, or administrators) had ever been denied. With some few exceptions, participation in co-curricular activities did not affect a student's grades.

The Christian Bible Club's Application

In January, 1985, Bridget Mergens, then a WHS senior, approached principal James Findley to obtain formal recognition of a "Christian Bible Club." With the knowledge of school officials but without their official approval, Ms. Mergens and other students had been meeting informally for religious speech for some time when the request was made.

The proposed club was to be "non-denominational," open to students regardless of creed, and was to provide Christian "fellowship" and a vehicle for proselytizing those who had not yet

"accepted" Christ. Mergens was willing to forego a school sponsor, and accept a school monitor, whose only responsibility would be to ensure order at club meetings.

Findley told Mergens that WHS could not sanction the proposed Christian Bible Club because it did not comply with School Board Policy 5610 [B-19-20], and because of the school district's concern that sanctioning a Christian Bible Club would violate the Establishment Clause. He told Mergens that the school had no objection to the continuation of the group's informal meetings.[1] Kenneth K. Hansen (then Superintendent of Schools) and James A. Tangdall (then Associate Superintendent of Schools) approved that decision. Mergens and her

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[1] He also suggested that meetings take place at a next-door church, and offered to intervene with church officials on behalf of the students.

attorney appealed to the Board of Education, which ratified the decision of the school administrators.

This Law Suit

In April, 1985, Mergens and several other WHS students filed suit asserting that the refusal to sanction the proposed Christian Bible Club violated the First Amendment, the Equal Access Act ("the Act"), and various state laws.

Because it thought the Board's constitutional challenge to the Act substantantial, the District Court, in May, 1985, denied plaintiffs' motion for a preliminary injunction requiring WHS to grant the Christian Bible Club recognition under the Act. In August of that year, the United States intervened pursuant to 28 U.S.C. §2403(a) to defend the Act's constitutionality. Plaintiffs unsuccessfully moved for summary judgment in October, 1985. Trial was delayed

while this Court considered Bender v. Williamsport Area School District, 475 U.S. 534 (1986).

The parties stipulated that WHS received federal funds. Of approximately thirty student activities, plaintiffs singled out ten as being noncurriculum related.[2] In addition, the parties stipulated that the Christian Bible Club sought all privileges enjoyed by other student activities, other than the "right" to a school paid and selected "sponsor" to direct its activities.

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[2] The clubs were:

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|---|---|
| Interact | Welcome to Westside |
| Chess | Future Business Leaders of America |
| Subsurfers | Zonta |
| National Honor Society | Student Advisory Board |
| Photography | Student Forum |

At the time the case was tried, photography was a formal class and not a club. Photography was previously offered as a club because there was no State certified photography teacher available.

The four day trial explored several issues at length: the justifications for denying the Christian Bible Club official sanction; the relation of the activities program at WHS in general; and the ten clubs singled out in the stipulation in particular, to the curriculum; the possibility that students would perceive recognition of the Christian Bible Club as official approval of its religious program; and the handling of controversial issues within the WHS curriculum.

School administrators testified that each and every student activity was required to, and did, advance the educational mission of the school. Sponsors were required to actively guide a club's activities. The degree of involvement by the sponsors varied from club to club, depending upon such things as the degree of activity of the club and

organizational skills of student participants. All club activities were under the direct supervision of an assistant principal, to whom the faculty sponsors were accountable for the activities, goals and objectives of their clubs.

Although student plaintiffs testified that clubs were not related to the curriculum, the principal, assistant principal in charge of student activities, and associate superintendent of schools testified at length that all student activities were curriculum related and offered specific justifications for their conclusions.[3] They also testified that school officials

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[3] These officials testified as follows as to the curriculum relatedness of the stipulated clubs:

National Honor Society, Welcome to Westside; Student Advisory Board, Student Forum. All were said to further the teaching of good citizenship, an overarching mission of WHS. The Student Advisory Board and Student Forum together formed

would have no way to guarantee that the Christian Bible Club would objectively explore all sides of controversial issues, as all other classes and activities were required to do.

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the student government and reinforced the government course. The National Honor Society promoted academic achievement generally. Welcome to Westside helped integrate new students into the school.

Future-Business Leaders of America; Subsurfers; Chess. WHS offered an extensive program of business courses. FBLA supplemented these offerings with practical lectures by businesspersons, as well as opportunities for students to operate their own enterprises and participate in an annual state convention. Chess was said to strengthen logic and reasoning skills. Teachers in the mathematics department actively encouraged chess in the mathematics resource room during the school day. Because of occasional disruption of students using the resource room for other purposes, the chess activity was converted to a club.

Interact and Zonta were service clubs which provided hands on community service activities. Each promoted service to the community. Those service projects could be used for extra-credit in certain courses. At various times, community service was required in one or more courses. Teaching the value of community service is an important part of the WHS curriculum.

Plaintiffs' curriculum expert, Dr. Ward Sybouts, testified that some theorists broadly defined curriculum to include all classes, programs and activities offered by a school, while others asserted a narrower definition. Dr. Sybouts gave his opinion that school activities programs, including student clubs, constitute part of the curriculum.

Dr. David Moshman, plaintiffs' child development expert (contradicted on this point by the "hands-on" experience of WHS school officials, all of whom had decades of experience in secondary schools), testified that by twelve years of age, children are generally capable of distinguishing between school sponsored and school tolerated activities. Dr. Moshman admitted, however, that not all children developed this capacity at the same age, that the capacity for making such distinctions generally increases

with age and experience, and that the abstract reasoning skills necessary to making such a distinction become more fully developed and consistently applied in college age students.

The District Court's Opinion

The United States District Court for the District of Nebraska entered judgment for the Board. It identified the core statutory issue as whether WHS intended to create a limited open forum. To answer that question, the Court turned to Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) which, together with the earlier decision in Widmar v. Vincent, 454 U.S. 263 (1981) provided the theoretical underpinnings of the Equal Access Act. Perry held that government must intentionally dedicate a place to unfettered debate before it becomes a limited public forum.

Applying this standard, the Court found that the School Board had not created a limited public forum in its student activities program [B-26-27]:

> [T]hose clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender.

The District Court also held that the Board's refusal to sanction the Christian Bible Club, although restrictive of speech, did not violate the students' freedom of speech, because, it was "reasonably related to [the] legitimate pedological concern," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 571 (1988), that all sanctioned school activities present balanced views on controversial issues, a policy enforced with respect to both curricular

and co-curricular activities. The reasonableness of the restriction was underscored because WHS students were free to engage in non-sanctioned religious associational activities on school premises.

The Court of Appeals' Opinion

The Eighth Circuit reversed, rejecting the District Court's interpretation of the phrase "noncurriculum related". Without explaining which clubs (other than the chess club) were "noncurriculum related" or offering any justification for rejecting the school officials' explanation of curriculum relatedness, the Court found that "many of the student clubs at WHS, including the chess club, are 'noncurriculum related'" [A-14].

The Court cited excerpts of the Act's legislative history suggesting that the definition of "noncurriculum related" meetings was intended by Congress to be

"fairly broad." The broad definition of curriculum relatedness urged by school officials would, the Court wrote, allow the Act to be overturned by administrative fiat [A-14-15].

The Eighth Circuit also rejected the Board's argument that the Act unconstitutionally established religion [A-19-20]. It noted that the Act tracked Widmar v. Vincent, 454 U.S. 263 (1981), and that the only question was whether high school students, were as capable as college students, of distinguishing school sponsored from school tolerated activities. The Court found no legally relevant difference between the two [A-20]:

> because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding. . . .
>
> Indeed even if Congress had never passed the EAA, our

> decision would be the same under Widmar alone.[4] (footnote omitted).

The Court did not take note of the reservation of this question in Widmar, 454 U.S. at 274, n. 14.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD RESOLVE THE CONSTITUTIONALITY OF THE EQUAL ACCESS ACT

Once before, this Court was persuaded that the question of whether student religious clubs may compel school authorities to grant them official recognition was sufficiently important to merit plenary review. Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

When certiorari was granted in Bender, there already existed substantial

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[4] All but one of the original plaintiffs had graduated by the time the case reached the Eighth Circuit. Plaintiffs' counsel sought leave before argument in the Court of Appeals to add additional plaintiffs who will not graduate for several years. That motion was still pending as of the date of the writing of this Petition.

conflict in the lower courts on this issue[5], both in theory and result, arising in turn from a clash between this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), upholding the free speech right of college students to meet in empty college classrooms to pray and

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[5] In addition to Bender v. Williamsport Area School Dist. 563 F.Supp. 697 (M.D. Pa. 1983) (recognition constitutionally required), rev'd, 741 F.2d 538 (3d Cir. 1984) (unconstitutional to grant recognition), rev'd on other grounds, 475 U.S. 534 (1986); Bell v. Little Axe Ind. School Dist., 766 F.2d 1391 (10th Cir. 1985) (unconstitutional to grant recognition); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (same); Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, reh. denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1159 (1983) (same); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) (same); Hunt v. Board of Educ., 321 F.Supp. 1263 (S.D.W.Va. 1971) (same); Trietly v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dept. 1978) (same); Johnson v. Huntington Beach Union H.S. Dist. 68, Cal. App. 3d 1, 137 Cal. Rptr. 43, cert. denied, 434 U.S. 877 (1977) (same); Contra, Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F.Supp. 1408 (N.D. Ill. 1984) (recognition constitutionally required).

study the Bible, and the demands of the Establishment Clause, requiring, again under this Court's cases, a high wall of separation between church and state in public secondary schools. Edwards v. Aguillard, 107 S.Ct. 2573 (1987); McCollum v. Board of Educ., 333 U.S. 1 (1948).

That conflict has intensified since Bender. First, notwithstanding numerous decisions holding that public school officials could not, consistent with the Establishment Clause, sanction student religious clubs, Congress adopted the Equal Access Act which purported to require just that result.

The Establishment Clause question raised in this petition must be answered whether the claim of a student religious club arises directly under the Constitution's Free Speech Clause, or, since Congress may not authorize an unconstitu-

tional result by statute, Mississippi College for Women v. Hogan, 458 U.S. 718 (1982), under the Act. Nevertheless, because the Act was enacted in the face -- indeed, with the purpose of superseding -- decisions holding "equal access" unconstitutional, it is appropriate that it be answered in a case arising under the Act.

School districts in judicial circuits which had ruled that school officials may not constitutionally permit religious clubs are now caught between the conflicting commands of the federal judicial and legislative branches.[6] Officials in other districts must guess

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[6] The Dallas School Board has determined on advice of counsel that it is bound by the Fifth Circuit's decision in Lubbock, not the Act. See, Clark v. Dallas I.S.D., 671 F.Supp. 1119 (N.D. Tex. 1987), app. pending, 88-1681 (5th Cir. 1989). The New York State Education Department, by contrast, has advised schools in New York to abide by the Act, and not the contrary decision of the Second Circuit in Brandon, supra. See,

which authority to follow -- at peril of being sued with the attendant disruption and expense whatever they decide -- a task complicated by the fact that the judiciary has not spoken with one voice, as the divergent results on the Establishment Clause in this case and Garnett v. Renton Area School District 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending, illustrate.[7]

Second, as to claims for equal access directly under the Free Speech Clause, this Court has, since Widmar, refined its public forum analysis

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Memorandum of December 12, 1989 from Robert Stone, Deputy Commissioner to Superintendents of Schools. (A copy is on file with the Clerk of the Court). Cf. Buffalo Board of Educ. v. Burr, C/A 88-1306A (W.D.N.Y., 1988), petition for writ of mandamus pending (2d Cir. 1989).

7 See also Perumal v. Saddleback Valley School Dist., 198 Cal. App. 3d. 64, 243 Cal. Rptr. 545, cert. denied, 109 S.Ct. 327 (1988) (unconstitutional to permit equal access); Amidei v. Spring Branch Ind. School Dist., C/A H-84-4673 (S.D. Tex. 1985) (Act constitutional).

substantially. Because the constitutional claims made by the students here (and elsewhere) for recognition of their Christian Bible Club are bottomed on the existence of a limited public forum, those refinements have a substantial impact on such claims.

The Eighth Circuit's unstated assumption here (as in Hazelwood School Dist. v. Kuhlmeir, 108 S.Ct. 562 (1988)), is that the bare presence of a multiplicity of voices evidences the existence of a limited public forum. As Hazelwood establishes, however, where school officials zealously limit access

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The Maryland Attorney General concluded that the Act was unconstitutional, 69 Md. O.A.G. ___ (1984). Leading constitutional scholars have likewise expressed divergent views, Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor, 98th Cong., 1st Sess. (1984) at 46 (statement of Professor L. Tribe); id. at 124 (letter of Dean N. Redlich).

to the forum to those meeting certain standards, and carefully monitor speech to ensure that it achieves balance, a limited public forum does not exist.

On the issue of whether an extensive co-curricular program creates a limited public forum, the lower courts are badly split. The Second Circuit in Brandon v. Board of Educ., supra, and the Fifth in Lubbock Civil Liberties Union v. Lubbock L.S.D., supra, have concluded that a co-curricular program does not create a limited public forum, while (in addition to the decision below) the Third and Tenth have reached the opposite conclusion in, respectively, Bender v. Williamsport Area School Dist., supra, and Bell v. Little Axe Independent School District, supra.

The confusion over the constitutionality of the student religious clubs has spawned much litigation, endless public

controversy, bred disrespect for political and legal institutions which interpret the Constitution in diametrically opposite ways, and has diverted school officials' attention from more pressing educational issues. This Court should grant certiorari to resolve the important constitutional questions presented.

## II. THE COURT SHOULD DECIDE WHAT CONSTITUTES A NONCURRICULUM RELATED MEETING FOR PURPOSES OF THE ACT

The Equal Access Act intrudes on the authority of educators to determine what student activities they will sanction. Since the Act's non-discrimination requirement is triggered only when a school allows "noncurriculum related" clubs to meet, how great that intrusion depends on how much discretion Congress accorded school officials to define what activities were "curriculum related."

Although Congress defined many other terms used in the Act, 20 U.S.C. §4072, it did not define the term "noncurriculum related", except for an oblique (and circular) reference to meetings "not directly related to the school curriculum," 20 U.S.C. §4072(c).

The legislative history is of some help, but is hardly conclusive; indeed, it points in several different directions at once. As the District Court noted (but the Court of Appeals overlooked), the limited public forum cases provided the blueprint for the Act. The legislative history is replete with references to this Court's holding that limited public forums are called into existence only by an intention to open a place to unfettered speech.[8] It was therefore

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[8] See e.g. 130 Cong. Rec. S. 8341 (daily edition, June 27, 1984) (remarks of Senator Leahy); 130 Cong. Rec. S. 8342 (daily edition, June 27, 1984) (remarks

reasonable for the District Court to interpret the Act in line with these cases.

Elsewhere in the course of debate, supporters of the bill suggested that certain named student clubs were "curriculum related" (French, football and cheer-leading being common examples) or "noncurriculum related" (chess clubs being the most common example). These statements, which use a laundry list approach to the interpretation of the Act, support the ruling of the Court of Appeals, but they were typically accompanied by a reminder (never discussed by the court below) that no hard and fast

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of Senator Gorten); 130 Cong. Rec. S. 8357 (daily edition, June 27, 1984) (remarks of Senator Durenberger); 130 Cong. Rec. H. 7732 (daily edition, July 25, 1984) (remarks of Representative Goodling).

Because of a contract dispute, the full edition of the Cogressional Record for 1984 is not available; hence the citations to the daily edition.

rule was possible, since each case would depend on the scope of a school's curriculum.[9]

In the Senate, Senator Hatfield, the prime sponsor of the bill which ultimately became the Act, proposed a test which went beyond a legislative enumeration of "curriculum related" groups. He suggested that "curriculum related" meant an activity which helped, or reinforced, formal course work. However, he noted that, even under his test, school officials would retain "full authority to determine where the line is to be drawn between 'curriculum-related' activities and 'noncurriculum related' ones."[10]

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9 See, e.g. 130 Cong. Rec. S. 8342 (daily edition, June 27, 1984) (remarks of Senator Hatfield); 130 Cong. Rec. S. 8358 (daily edition, June 27, 1984) (remarks of Senator Biden).

10 130 Cong. Rec. S. 8342 (daily ed. June 27, 1984) (remarks of Senators Hatfield and Gorton).

Some in the House of Representatives took a different tack. A key supporter of the bill suggested a two part inquiry to determine whether a meeting was curriculum related: (1) "is the subject matter of the meeting of a type which a public school could sponsor" and (2) "does the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work."[11]

These different approaches in the legislative history are reflected in the conflicting decisions in this case and Garnett. In this case, the Eighth Circuit emphasized that the Act embodied a "broad definition" of "noncurriculum related," and that some clubs were per se "noncurricular related." It believed such a reading was necessary to give full

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[11] 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

effect to the rights guaranteed students under the Act. The Court rejected good faith explanations of the "curriculum-relatedness" of WHS' student activities program.

The Eighth Circuit's analysis does not adequately respect the autonomy of local school districts. If accepted, it would bind more than 17,000 secondary schools[12] (as defined by state law)[13] in the United States (probably all or most of which accept federal funds) which have a student activity program, to a rigid and narrow definition of curriculum by supposed Congressional fiat.

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12 Letter from J. Sietsema, CCD Coordinator of National Center For Education Statistics to Ron Lebovitz (March 2, 1989). A copy of the letter is on file with the Clerk of this Court.

13 Under the Act, the definition of secondary schools is to be determined under state law, 20 U.S.C. §4072(1), which, in Nebraska, is defined as seventh through twelfth grade.

By contrast, the Ninth Circuit in Garnett, supra, finding the clubs there to be "curriculum related," emphasized the discretion afforded school officials to determine the line between curriculum related and "noncurriculum related" meetings, but does so at the expense of rights students can plausibly (but we think ultimately incorrectly) claim under the Act.

The resolution of the conflict in statutory interpretation between the Eighth and Ninth Circuits as to the interpretation of the Act, without more, merits review in this Court. Review of this conflict might have the additional virtue of obviating the need for a decision preferring one constitutional right over another.[14]

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[14] Cf. Mesa v. California, 57 U.S.L.W. 4199, 4204 (1989).

But even without regard to the inter-circuit conflict, and without regard to the desirability of avoiding unnecessary constitutional decisions, review here is appropriate lest a vaguely worded federal statute, with a complex and confusing legislative history, cause school officials to needlessly eliminate otherwise valuable co-curricular programming in order to guarantee a closed forum. That will be the inevitable result if, because of the uncertainty of the statute's scope, school officials cannot be certain that maintaining traditional co-curricular programs sponsored by public secondary schools will not inadvertently result in the creation of a limited open forum.

## Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 1989

# APPENDIX A

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 88-1227

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| | | |
|---|---|---|
| Bridget C. Mergens, by & through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by & through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by & through his next friends, Robert W. & Sherry K. Rensing; David K. Harris, by & through his next friends Kenneth & Myra Harris, and Andrea Simmons, by & through her next friends, Robert L. & Linda L. Simmons, | * | Appeal from the United States District Court for the District of Nebraska |
| Appellants | * | |
| United States of America Intervenor-Plaintiff Below. | * | |
| Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and | * | |

| | |
|---|---|
| Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends Kenneth Harris and Myra Harris; Kevin Brown, etc. by and through his next of friends Robert W. Rensing and Sherry K. Rensing, | * |
| Appellants, | * |
| v. | * |
| The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; & Kenneth K. Hansen, Superintendent of the Westside Community School District, | * |
| Appellees. | * |

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Submitted: October 17, 1988

Filed: February 8, 1989

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Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

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McMILLIAN, Circuit Judge.

Appellants, students who attend Westside High School, a public school, appeal from a final judgment entered in the District Court for the District of Nebraska. The case was tried to the court. The district court held that the formation of a Christian Bible Study Club at Westside High School in Omaha, Nebraska, would violate the establishment clause of the first amendment.

For reversal, appellants argue that (1) Westside High School maintains an open forum, (2) the Equal Access Act, 20

U.S.C. § 4071-4074 (1984) (EAA), is constitutional and should be applied to this case, and (3) the actions of the Westside High School administration violate the first and fourteenth amendments. For the reasons discussed below, we reverse the judgment of the district court.

Westside High School (WHS) is a part of the Westside Community School system, an independent public school district, in Omaha, Nebraska. The school is controlled by appellee, the Board of Education of the Westside Community Schools (School Board). As a public school, WHS receives federal funds.

WHS students are allowed to become members of various student groups and clubs, all of which meet after school hours on school grounds. The students may choose from approximately thirty

different groups and clubs on a strictly voluntary basis. All of the clubs have faculty sponsors.

Board Policy 5610 recognizes these student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." There is no written school board policy concerning the formation of clubs. Rather, students wishing to form a club present their goals and objectives to a school official who analyzes the stated goals and objectives and decides whether or not the proposed club is consistent with Board Policy 5610. Until appellants attempted to form a Christian Bible Study club in January 1985, no club had ever been denied access to the school.

Appellants first presented their idea for a Christian Bible Study Club to Dr. Findley, the principal of WHS. Dr. Findley denied their request. Again in February 1985, appellants presented their request to Dr. Findley and Dr. Tangdall, associate superintendent of schools for the Westside Community Schools. At that time the request was discussed with Kenneth Hansen, superintendent of schools for the Westside Community Schools. The three school officials agreed that appellants' request should be denied on the basis that allowing such a club would violate the establishment clause of the first amendment.

On March 4, 1985, appellants petitioned the School Board to approve their request to form a Christian Bible Study Club. Appellants stressed to the

Board that they were not requesting a faculty sponsor unless required by school policy. If one were required, appellants asserted that the faculty sponsor would only be needed for custodial purposes. The School Board denied appellants' request stating that the proposed club would not be consistent with Board policy which permits school buildings to be used only for school-sponsored, curriculum-related activities.

In April 1985 appellants brought suit in the District Court for the District of Nebraska alleging that their freedom of speech, freedom of assembly and association, and freedom to exercise religion had been violated by the School Board and its employees in violation of the first and fourteenth amendments,

Article I of the Nebraska Constitution, and the Equal Access Act, 20 U.S.C. § 4071-4074.

On February 2, 1988, the district court entered judgment in favor of appellees. The court held that WHS maintains a closed forum and that therefore the Equal Access Act does not apply to WHS. Bridget Mergens, et al. v. The Board of Education of the Westside Community Schools, et al., No. CV 85-O-426, slip op. at 13 (D. Neb. Feb. 2, 1988). The court further held that the actions of WHS officials did not violate the students' first and fourteenth amendment rights. Id. at 15. This appeal followed.

**Application of the Equal Access Act**

The EAA provides in relevant part:

> **(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited**
>
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> **(b) "Limited open forum" defined**
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. § 4071(a)-(b).

The EAA is only applicable to those federally assisted public secondary schools which maintain a "limited open

forum" as defined by the Act. A public secondary school may properly exclude a student club on the basis of the content of the club's speech only if the school maintains a closed forum--that is, if all of the other student clubs are curriculum related. If even one noncurriculum-related student club is allowed, the school maintains a limited open forum as defined by the EAA and cannot deny the club access to school premises during noninstructional time on the basis of the content of the club's speech.

"Noncurriculum related" is not defined in the Act. Appellants argue, however, that WHS has created a limited open forum because several of the student clubs are noncurriculum-related. Some ten clubs were cited by appellants as being noncurriculum-related. Among these are the Chess Club; Interact, a service

club peripherally connected to Rotary International; Subsurfers, a club for students and community members interested in scuba diving; and Zonta, the female counterpart to Interact.

At trial, WHS attempted to show that each of these clubs is curriculum-related. For example, Dr. Findley testified that the Chess Club related to the curriculum because it fosters critical thinking and logic. Dr. Findley explained that such skills are extensions of the goals for several different courses, even though WHS does not offer a logic class. Dr. Findley explained that Zonta and Interact are related to the goals of sociology and psychology and that Subsurfers relates to the goals of physical education. The district court found these arguments persuasive and held

that WHS maintains a closed forum and that, therefore, the EAA does not apply to WHS. We disagree.

Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum

and then discriminate against a particular student group on the basis of the content of the speech of that group.

The legislative history of the EAA is helpful in determining what Congress intended to be considered noncurriculum-related. During a Senate debate before the passage of the bill, Senator Gorton and Senator Hatfield discussed the definition of "noncurriculum-related" student groups:

> MR. GORTON: I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The chess club would be such a group. If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the act.

MR. HATFIELD: That is correct. 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statements of Sens. Gorton and Hatfield). Congress did not intend for the EAA to be easily circumvented by administrative decree. Many of the student clubs at WHS, including the chess club, are noncurriculum-related. Therefore, WHS maintains a limited open forum, and the EAA forbids discrimination against appellants' proposed club on the basis of its religious content.

**Constitutionality of the Equal Access Act**

Appellees argue that even if WHS has created a limited open forum, this court should still affirm the decision of the

district court because the EAA violates the establishment clause. We disagree.

The EAA codifies the Supreme Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), (Widmar), extending that holding to secondary public schools.[1] The facts in Widmar are quite similar to the facts in the instant case. The University of Missouri at Kansas City, a state university, generally allowed registered student groups to use its facilities. However, the university did

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[1] As Senator Levin explained during the Senatorial debate before passage of the EAA:

> [T]he pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin).

not allow registered student groups desiring to use the facilities for religious worship and religious discussion.

To determine whether an "equal access" policy at the university allowing registered student religious groups to meet would offend the establishment clause, the Court applied the three-part test from Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (Lemon). Under the Lemon test, a policy or statute is constitutionally sound if: (1) it has a "secular . . . purpose," (2) "its . . . primary . . . effect . . . neither advances nor inhibits religion," and (3) it does not "foster 'an excessive government entanglement with religion.'" Id. (citation omitted).

Widmar concluded that an equal access policy at the university level did not violate any part of the Lemon test. First, the policy has a secular purpose because one of the university's purposes is to provide a forum for the exchange of ideas between students. 454 U.S. at 271 n.10.

Second, the policy did not have the "primary effect of advancing religion" because any benefits conferred on religious groups would be "merely 'incidental.'" Id. at 273. Two factors influenced the Court in its determination that an equal access policy at the university level did not have the primary effect of advancement of religion. First, the policy did not "confer any imprimatur of state approval on religious sects or practices," id. at 274, because young adults are able to understand that

such a policy is neutral toward religion. Id. at 374 n.14. Second, the fact that the benefits would be devolved upon such a wide variety of nonreligious as well as religious groups would indicate a "secular effect." Id. at 274.

Finally, an equal access policy was less likely to entangle the university with religion than a policy of religious censorship which would require the university not only to define "religious speech" but also to constantly monitor the meetings of registered student groups. Id. at 272 n.11.

The Court also held that the university's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral." Id. at 277.

The language of the EAA closely tracks the holding of the Court in Widmar. In fact, the only difference between the EAA and Widmar is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students.[2] We reject this notion because Congress

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[2]The argument that less mature high school students are likely to confuse an equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the EAA:

> Authors writing in leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism.

S. Rep. [illegible] 357, 98th Cong., 2d. Sess. 8 (1984).

considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding.

Indeed the facts in the case before us today are the same as the facts in Widmar except for the setting. Therefore, even if Congress had never passed the EAA, our decision would be the same under Widmar alone.[3]

Accordingly, we reverse the decision of the district court.

A true copy.

Attest:

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[3] But see Garnett v. Renton School District No. 603, No. 88-3552 at 375, 384 (9th Cir. Jan 17, 1989).

> The impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals--distinguish public secondary schools from public universities.

CLERK, U.S.

COURT OF

APPEALS, EIGHTH CIRCUIT.

# APPENDIX B

## Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| BRIDGET C. MERGENS, et al., | ) | CV 85-O-426 |
| Plaintiffs, | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Intervenor Plaintiff, | ) | |
| vs. | ) | MEMORANDUM |
| THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al., | ) | |
| Defendants. | ) | |

APPEARANCES:

For plaintiffs -- Douglas Veith
Omaha, Nebraska

Douglas W. Davis
Robert K. Skolrood
Virginia Beach,
Virginia

For plaintiff-intervenor -- Douglas Semisch
Omaha, Nebraska

Theodore C. Hirt
Thomas Bevard
Washington, D.C.

For defendant -- Allen E. Daubman
Verne Moore, Jr.
Omaha, Nebraska

BEAM, District Judge.

This matter comes on for decision after a trial to the Court. The basic issue presented is whether the formation of a Christian religious club at Westside High School (WHS) in Omaha, Nebraska is constitutionally permissible.

Plaintiffs contend that the Equal Access Act (EAA), 20 U.S.C. §§ 4071-74 and the first amendment to the Constitution of the United States allow them to form and operate the proposed group. Specifically, the plaintiffs claim that their free speech and free religious exercise rights guaranteed by the first amendment are being violated by WHS and that their fourteenth amendment right to equal protection is being ignored. The defendants, on the other

hand, argue that such an activity, if permitted, would violate the establishment clause of the first amendment, notwithstanding the mandates of the EAA or the plaintiffs' other constitutional rights.

The Court finds that plaintiffs have standing to raise these issues, that all constitutional rights alleged are available to plaintiffs but that such rights have not been violated by WHS under the circumstances presented in this action.

Facts

Plaintiffs are former and current students of WHS who attempted to form and operate a Christian Club at the school. The proposed club would have been identical in its formation, rights, privileges, and obligations to all other WHS clubs with but one exception, no

faculty sponsor was proposed unless required. See Pretrial Stipulation 13. The Principal of WHS, Dr. James E. Findley, and Dr. James A. Tangdall, Superintendent for the Westside Community Schools, ultimately denied the plaintiffs' request. The Board of Education voted to uphold the denial.

Constitutional Background

The first amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The history and background of this passage in the First Amendment has been discussed on numerous occasions and the debate will not be reiterated here in detail. See Engel v. Vitale, 370 U.S. 421, 425-30 (1962); McGowan v. Maryland, 366 U.S. 420, 437-42 (1961); Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947).

It suffices to say that our founding fathers were adamant about protecting religious activities from government interference, whether promotional or prohibitory in nature.

The barrier between religion and government has been likened to a "wall between church and state." Everson, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). However, the tension between the free speech, establishment and free exercise clauses of the first amendment make the Everson proclamation more a motto than an immutable principle. As the role and mission of government has changed, the striking of a proper balance of interests has become increasingly difficult.

Religious instruction has traditionally been the responsibility of church and home. Even when these

interests have become intertwined, in part, with secular educational activities, they have been constitutionally protected. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state act could not require primary school students to abandon church operated school in favor of a public educational institution).

The right of free speech is protected in our public high schools. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (students' right of free speech upheld). And, the right is no less protected when it is religious in nature. Bender v. Williamsport Area School Dist., 741 F.2d 538, 545 (3d Cir. 1984), vacated for lack of standing, 475 U.S. 534 (1986) (citing Heffron v. International Soc'y for Krisha Consciousness, 452 U.S. 640, 647 (1981)).

In fact, the thrust of the free exercise and free speech clauses, when considered together, leads to the conclusion that heightened consideration should be accorded religious speech, wherever it is practiced.

Mr. Justice Douglas, in delivering the opinion for seven members of the Supreme Court in Murdock v. Pennsylvania, 319 U.S. 105 (1943), said, "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position." Id. at 115 (emphasis added). However, as our society has become more pluralistic, Justice Douglas' pronouncement in Murdock has been muffled. Bright lines circumscribing constitutional interests, if any ever really existed, have blurred. There appears to have been an enhancement in the force of the establishment clause at the expense of the free speech and

free exercise clauses. The result has been, according to many, a diminution of the influence of religious mores upon educational and other governmental activities, contrary to the intent, it is argued, of the framers of the Constitution. Thus, for the Court, these issues present at the very least, "a constitutional conflict of the highest order." Bender, 741 F.2d at 557.

The analysis necessary to properly apply the competing interests in this dispute is guided by the holding of the Supreme Court in Widmar v. Vincent, 454 U.S. 263 (1981). In Widmar, the University of Missouri at Kansas City (UMKC) prohibited a religious group from using university facilities "for purposes of religious worship or religious teaching." The UMKC action was

challenged, as here, by students asserting free exercise and free speech rights.

The University argued that to offer its facilities for a religious purpose would violate the establishment clause. It pointed to the three pronged test established by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). In Lemon, the Court said that in order to pass constitutional muster the government policy in question (1) must have a secular legislative purpose; (2) must have a primary effect of neither advancing nor inhibiting religion; and (3) must not foster an excessive government entanglement with religion. Widmar, 454 U.S. at 271 (citing Lemon, 403 U.S. at 612-13).

It is clear from Widmar that religious speech is afforded the same protection as the political speech shielded, in an educational setting, in Tinker. It is equally clear, however, that in such a setting, reasonable regulations compatible with the mission of the institution may be applied. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, ____, 56 U.S.L.W. 4079, 4082 (1988).

At UMKC, over 100 student groups had been recognized by the administration. The various clubs embraced a wide variety of political, cultural, educational, athletic and other interests. Under the circumstances, the Court found that at least a limited open forum existed for the exchange of ideas and information by students. Thus, the Court determined that two of the three prongs of Lemon had

been met. "[A]n open forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement of religion." Widmar, 454 U.S. at 271-72.

The University argued that a forum within which religious speech was permitted would have the "primary effect" of advancing religion. Id. at 272. The Court found, however, that in such a context the open forum would not result in an unconstitutional advancement of religion.[1] Indeed, the Court, citing

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[1]In this regard, WHS argues that high school students, as compared with college students at UMKC, are more impressionable and more susceptible to believing that the school approves and promotes the religious activity. Under the facts of this case, the Court rejects this contention. First, the proposed format protects against the conferring of an imprimatur of school approval. Second, Dr. David Workman, an expert in the development of cognitive reasoning and intellectual development, testified that students over the age of 12 years can make sponsorship distinctions and that

Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973), restated that a religious organization may receive "incidental" benefits from government without the creation of a constitutional violation. Widmar, 454 U.S. at 273-74.

The Westside Story

Widmar, thus, provides the initial framework for deciding this case.[2] At this point, however, the Court must also begin its consideration of the Equal Access Act since the Act is, at least in part, a congressional effort to make

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there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school. The Court credits this evidence.

[2]As in Widmar, this is not a case in which plaintiffs claim that denial of facilities not available to other groups leads to a first amendment violation. Id. at 273 n.13.

Widmar applicable to public secondary schools.[3] The Act provides, in part, as follows:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> * * *
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

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[3]The Committee Report discusses Widmar at length, and the language of the statute tracks, at least generally, the holdings of Widmar, directing their application to public secondary schools. See generally, S. Rep. No. 357, 98th Cong., 2d Sess. 5-7, 21-27, reprinted in 1984 U.S. Code Cong. & Admin. News, 2348, 2351-53, 2367-73.

20 U.S.C. §§ 4071(a)-(b).

The Act's applicability turns on whether or not the public secondary school has created a limited open forum, as was found by the Supreme Court to exist in Widmar. If a school has created a limited open forum, the Act applies and mandates that the school offer a "fair opportunity" to students who wish to conduct a meeting for religious or other purposes. 20 U.S.C. § 4071(c). If a closed forum exists, however, the act does not require a school to indiscriminately permit student groups to meet on school premises. The first question which must be addressed by the Court, then, is the nature of the forum at WHS.

The Supreme Court has recognized three types of speech forums: open or public, limited open, and closed. The Court has defined open and limited open forums as follows:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant

> government interest, and leave open ample alternative channels of communication.
>
> A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (citations omitted). In the secondary school setting, the Supreme Court has recently stated that "school facilities may be deemed to be public forums only if school authorities have

'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." Hazelwood, 108 S. Ct. at ____, 56 U.S.L.W. at 4081. If the school reserves the use of its facilities for other intended purposes, no public forum is created. Id. Under the EAA, the question is somewhat more focused, turning on whether the school permits "noncurriculum related student groups" to meet on school premises. 20 U.S.C. § 4071(b).

In Widmar, the Court found that an open forum existed because the University had made its facilities "generally available" for use by student groups, and had enacted a policy of "accommodating" and "encouraging" student group meetings. Widmar, 454 U.S. at 267. As indicated,

the University had recognized numerous student organizations, representing a "broad spectrum" of topics and interests. Because the University had created an open forum, it was required to demonstrate a compelling interest supporting its decision to exclude a religiously oriented group from use of its facilities. Id. at 269-70. The Court recognized that its holding was narrow, and limited to instances where a forum "generally open to student groups" had been created. Id. at 277.[4]

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[4]A limited open forum was also found to exist in Bender. There, the school had a scheduled "activity period" during regular school hours, where students could attend a meeting of the club of their choice. All types of clubs were permitted by the school, the only limitation being that the club "contribute to the intellectual, physical or social development of the student" and be "legal[ly] and constitutionally proper." Bender, 741 F.2d at 544. Such facts, like the situation present in Widmar, differ markedly from the policy in force at WHS.

The defendants argue that this case presents facts at variance with Widmar, in that WHS maintains a closed forum. They cite School Board Policy 5610, which states:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.
>
> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

> Students participating in out of school clubs or organizations may not identify the clubs as school-affiliated organizations without prior administrative approval.

Defendants argue that this policy demonstrates the following: (1) student clubs and organizations are an integral part of the WHS program; (2) clubs must be under the direct control of the school administration; (3) there must be a faculty sponsor; and (4) all WHS clubs are curriculum related.

In determining the kind of forum which exists at WHS, the Court must look at the overall makeup of the school curriculum and club system. Pretrial Order Stipulation #17 states:

> Plaintiffs and Defendants have agreed that the following ten clubs are ones which Plaintiffs claim are noncurriculum [related] for purposes of the Equal Access Act and Plaintiffs' constitutional claim of right of access to school premises for the

Christian Club. By doing so Plaintiffs are not admitting that the remaining clubs are curriculum related as envisioned by the Equal Access Act:

| | |
|---|---|
| Interact | Welcome to Westside |
| Chess | Future Business |
| Subsurfers | Leaders of America |
| National | Zonta |
| Honor | Student Advisory |
| Society | Board |
| Photography | Student Forum |

Dr. Findley and Dr. Tangdall discussed each of these student organizations. They explained that Interact, a service club which is peripherally connected to Rotary International, is related to sociology and psychology, and that participation can result in a better grade for a student; chess club provides an arena for logical thinking, and is, therefore, an extension of a WHS logic class; Subsurfers, it is urged, is related to the goals of the physical education department; the National Honor

Society is related to all courses and is an honor and not, technically, a club; photography club is really a class which is related to the art department; Welcome to Westside likewise is not a club but a matching of new students with older students in an effort to provide a better educational ambience; Future Business Leaders of America fosters the development of business skills and is related to WHS business and economic courses; Zonta is the female counterpart to Interact; and, Student Advisory Board and Student Forum are generally related to democracy, citizenship, and indirectly, to the classes on government.

All of these clubs apparently have sponsors. The involvement of sponsors varies from club to club based on the needs of the club and the desire of the sponsor. Likewise, sponsors receive

remuneration for their services, although no clear guidelines were presented for determining the amount of pay received.

Dr. Findley testified that, in his opinion, all clubs and activities at WHS are curriculum related. Dr. Findley further stated that the WHS administration strongly encourages participation in the club system. He said that the curriculum at WHS includes requires courses, elective courses, and clubs. Clubs and activities, it is urged by Dr. Findley, are important to the overall goals and mission of the school because children who partake of activities seem to be more successful in later life.

Aside from the club system, the general atmosphere at WHS appears to encourage frank discussion of controversial issues. During

instructional times, such topics as drugs, separation of church and state, Vietnam protests, use of arm bands, atheism, abortion, homosexuality, birth control, premarital sex, nuclear war, and Contra aid are discussed. Controversial subjects appear in the school newspaper. Recently a poster for an evangelist speaker was posted, although Dr. Findley indicated that he removed it. The administration argues that in all of these discussions a balanced point of view is sought to be presented. Testimony at trial demonstrated that WHS administrators are extremely concerned with exposing students to all sides of controversial issues. Dr. Findley testified that permitting a sanctioned Christian group would stand in conflict with this policy. In fact, he said that he would consider doing away with all

clubs at WHS, if necessary, to ensure that a closed forum, consistent with administrative policy, could be maintained.

Upon consideration of all these facts, the Court concludes that WHS has not created a limited open forum as that term is used in the EAA or in the Supreme Court's analysis in Widmar and Hazelwood. Clearly the facts do not establish that WHS has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. In fact, WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions. The Court is convinced that those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the

educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender. These differences justify an alternate conclusion in this case. The Court, therefore, finds that WHS has not created an open or limited open forum which now requires access to its facilities by the plaintiffs' club.[5]

The only remaining issue which must be addressed in light of the Court's determination that WHS maintains a closed forum is whether the school's refusal to permit the plaintiffs' club to meet within this closed forum unduly infringes upon the plaintiffs' first amendment rights to freedom of speech and free

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[5]Given this conclusion, WHS is not bound by the dictates of the EAA. The Act's constitutionality need not, therefore, be addressed by the Court in this case.

religious exercise. The Court is guided in this regard by the standards set forth by the Supreme Court in Hazelwood. The Supreme Court recognized in Hazelwood that when a public forum has not been created by a school, school officials may impose restrictions on the speech of students, teachers, and other members of the school community which are "reasonably related to legitimate pedagogical concerns." Hazelwood, 108 S. Ct. at ____, 56 U.S.L.W. at 4082. The Court said, "It is only when the decision to censor a . . . vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights." Id. at ____, 56 U.S.L.W. at 4082-83 (citations omitted).

The purpose articulated by WHS administrators for refusing to permit the plaintiffs' club to meet involves the school's goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities. The Court finds this to be a legitimate educational concern which reasonably justifies WHS's actions in this case. Under the test set forth in Hazelwood, the decision of WHS to deny the plaintiffs access to its facilities for officially sanctioned meeting purposes does not offend the constitution.

In so holding, the Court notes that plaintiffs are free to exercise their religious beliefs and engage in informal religious discussions at school. Bridget Mergens testified that she was never prohibited from engaging in such

activities at WHS. In fact, Dr. Findley stated that he would have agreed to and even encouraged nonsanctioned, informal meetings by Mergens' group. Any attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place and manner restrictions would meet strong constitutional objection. See, e.g., Tinker, 393 U.S. at 513. In this case, the Court holds simply that WHS need not permit its facilities to be used by a school sanctioned Christian club.

Conclusion

On the facts adduced, the plaintiffs have not sustained their burden of proof on the issue of the nature of the forum presented. Accordingly, this action

should be dismissed. A separate order consistent with this Memorandum will be entered.

DATED this 2nd day of February, 1988.

BY THE COURT:

C. ARLEN BEAM
U.S. District Court
Judge
Sitting by Special
Designation

# APPENDIX C

# APPENDIX C

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071-4074.

## §4071 Denial of Equal Access Prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that -

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meet-

ings only in a non-participatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Federal or State authority nonexistent with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof -

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Unaffected Federal financial assistance to schools

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order-and-discipline, well-being, and voluntary-presence concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§4072. Definitions

As used in this subchapter -

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly

related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with with the provisions of this subchapter.